No. 09-800

In the Supreme Court of the United States

NORTH COUNTY COMMUNITY ALLIANCE, INC.,
PETITIONER

v.

KEN L. SALAZAR, SECRETARY OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, requires that a tribal gaming ordinance include the location of a potential gaming site, and that the National Indian Gaming Commission determine that the site qualifies as "Indian lands" before approving the ordinance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 573 F.3d 738. The opinion of the district court (Pet. App. 32-53) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2009. A petition for rehearing was denied on October 6, 2009 (Pet. App. 54-55). The petition for a writ of certiorari was filed on January 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. 2701 *et seq.*), was enacted in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). IGRA establishes three classes of gaming. Class I gaming, which consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies or celebrations, is subject to the exclusive regulatory control of Indian Tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming, which includes bingo and similar games, and Class III gaming, which includes slot machines and blackjack, are subject to federal regulation under IGRA. 25 U.S.C. 2703(7) and (8), 2710(a)(2), (b) and (d).

Under IGRA, a Tribe that wishes to conduct Class II or III gaming must, among other things, submit a tribal gaming ordinance for approval by the Chairman of the National Indian Gaming Commission (NIGC). 25 U.S.C. 2710(b)(2) and (d)(1)(A). IGRA requires the NIGC Chairman to approve a Class II or Class III gaming ordinance if the ordinance satisfies a number of specific conditions relating to ownership and control of the gaming, use of gaming revenues, audits, protection of the environment and public health and safety, and background investigations. 25 U.S.C. 2710(b)(2); see 25 U.S.C. 2710(d)(1)(A)(ii).

b. IGRA applies only to gaming on "Indian lands." 25 U.S.C. 2710(b)(1) (Class II) and 2710(d)(3) (Class III); NIGC, *Facility License Standards*, 73 Fed. Reg. 6022 (2008) (final rule) ("IGRA requires that all gaming take place on 'Indian lands.' Gaming that does not take

place on Indian lands is subject to all state and local gambling laws and federal laws apart from IGRA.") (citation omitted). The statute defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. 2703(4); see also 25 C.F.R. 502.12.

Gaming generally may not be conducted on certain "Indian lands"—namely, Indian lands acquired in trust for the benefit of a Tribe after October 17, 1988. 25 U.S.C. 2719(a). That general prohibition is, however, subject to certain exceptions. 25 U.S.C. 2719(a) and (b).

2. In 1993, the Nooksack Tribe, a federally recognized Indian Tribe with a reservation in northwestern Washington, submitted a Class II and Class III tribal gaming ordinance to the NIGC for approval. Pet. App. 3. The Tribe's ordinance did not specify a particular site or sites where the gaming would occur, but instead, as relevant here, provided that the Nooksack Gaming Commission would "issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance." *Id.* at 4. The NIGC approved the ordinance. *Id.* at 3; *Approval of Class III Tribal Gaming Ordinances*, 58 Fed. Reg. 65,406 (1993).[1]

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[1] The ordinance and the NIGC Chairman's letter approving the ordinance are available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/nooksack/nooksackord102793.pdf.

Shortly after the NIGC approved the ordinance, the Nooksack Tribe established a Class III gaming facility on its reservation in Deming, Washington. Pet. App. 4. That facility is not at issue in this case.

In 2006, the Tribe licensed and began building a second gaming facility called the Northwood Crossing Casino. Pet. App. 4. The Casino is located approximately 33 miles by road from the Nooksack reservation, on land that the United States had taken into trust for the Tribe in 1984. Pet. App. 4, 34; Pet. 5; see Gov't C.A. Br. 34 n.17.

3. In July 2007, petitioner filed suit against respondents in the United States District Court for the Western District of Washington. Pet. App. 5, 34. Petitioner claimed, among other things, that respondents violated IGRA by failing to determine—either in 1993 when the Nooksack ordinance was approved or in 2006 when the Tribe licensed and began constructing the Northwood Crossing Casino—that the land on which the Casino was built is Indian land. *Id.* at 5.

The district court dismissed the complaint with prejudice under Federal Rules of Civil Procedure 12(b)(1) and (6). Pet. App. 32-53. The court held that petitioner's challenge to NIGC's 1993 approval of the Tribe's gaming ordinance was barred by the applicable six-year statute of limitations, 28 U.S.C. 2401(a). Pet. App. 36-43. The court further rejected petitioner's argument that IGRA required respondents to make a formal Indian lands determination before the construction of the Casino in 2006. *Id.* at 44-50.

4. The court of appeals affirmed. Pet. App. 1-24. As an initial matter, the court held that neither petitioner's challenge to the 1993 approval of the gaming ordinance nor its challenge to respondents' failure to make an In-

dian lands determination before the Casino was built in 2006 was barred by the applicable statute of limitations. *Id.* at 6-9. The court reasoned that petitioner's claim that the NIGC acted ultra vires by failing to make an Indian lands determination in 1993 did not accrue until petitioner "took an interest" in the issue in 2006. *Id.* at 9 (citing *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 715 (9th Cir. 1991)).

On the merits, the court of appeals held that respondents "did not have a duty under IGRA to make an Indian lands determination in 1993 before approving the Nooksacks' non-site-specific proposed gaming Ordinance." Pet. App. 3. The court noted that nothing in the text of IGRA requires a Tribe to submit a site-specific gaming ordinance as a precondition for NIGC approval, *id.* at 13, 17, and that "in practice most gaming ordinances approved by the NIGC do not identify specific sites," *id.* at 18. Absent a statutory obligation to identify specific sites in a proposed ordinance, the court reasoned that "it would be absurdly impractical to require NIGC to make an Indian lands determination as part of its approval of an ordinance." *Id.* at 17.

The court of appeals further held that respondents "did not have a duty under IGRA to make an Indian lands determination before 2006 when the Nooksacks licensed and began construction of the Casino pursuant to the approved Ordinance," Pet. App. 3, explaining that nothing in IGRA's text or applicable regulations imposed such a requirement, *id.* at 18-19.

The court of appeals acknowledged that IGRA and the regulations in effect at the times relevant to petitioner's lawsuit could potentially lead to a Tribe operating a Class II gaming facility on non-Indian land pursuant to a non-site-specific gaming ordinance. Pet. App.

19. The court noted, however, that the NIGC has statutory authority to order the closure of a facility located on land not eligible for gaming under IGRA, *id.* at 21-22, and that the NIGC had recently promulgated regulations designed to facilitate eligibility determinations before gaming facilities are opened, *id.* at 19-20.

Judge Gould dissented in part. He would have held that NIGC was required to make an Indian lands determination before construction of the Casino began in 2006. Pet. App. 24-31.

ARGUMENT

Petitioner contends (Pet. 11-18) that IGRA requires respondents to make an Indian lands determination before approving a Tribe's gaming ordinance. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. As the court of appeals correctly explained (Pet. App. 12), IGRA requires the Chairman of the NIGC to approve a proposed tribal ordinance concerning Class II gaming if the ordinance meets certain specified conditions relating to ownership and control of the gaming, use of gaming revenues, audits, protection of the environment and public health and safety, and background investigations. 25 U.S.C. 2710(b)(2). IGRA does not require a Tribe to specify a particular site or sites in its proposed gaming ordinance. *Ibid.*; see Pet. App. 17. Nor does IGRA require the NIGC to determine, before approving the ordinance, that any and all possible sites on which the Tribe might conduct gaming qualify as eligible Indian land within the meaning of the statute. See *ibid.* (rejecting that notion as "absurdly impractical").

Petitioner identifies one provision of IGRA, 25 U.S.C. 2710(b)(2)(E), that it claims "rather plainly contemplates" site-specific approval of gaming ordinances based on an Indian lands determination. Pet. 15. That provision requires that a Tribe's ordinance provide that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. 2710(b)(2)(E). That provision of IGRA, however, does not so much as mention "Indian lands," much less does it require a pre-approval Indian lands determination.

Nor, contrary to petitioner's argument (Pet. 15), does Section 2710(b)(2)(E) require a site-specific determination whether the "construction" of a particular gaming facility—not to mention the facility's "maintenance" or "operation"—is being conducted in an environmentally responsible and safe manner *before* the NIGC approves the ordinance that would authorize the gaming in question. Section 2710(b)(2)(E) simply requires that a gaming ordinance provide for the environmentally responsible and safe construction, maintenance, and operation of any gaming facilities established pursuant to the ordinance. Once a gaming facility is established pursuant to an approved ordinance, NIGC regulations provide for periodic environmental, public health, and safety reviews pursuant to its enforcement authority over ongoing gaming operations. 25 C.F.R. 573.6(a)(12); *Environment, Public Health and Safety*, 67 Fed. Reg. 46,109 (2002) (interpretive rule).

2. Petitioner contends (Pet. 13-14) that, even if IGRA contains no explicit requirement that the NIGC make an Indian lands determination before approving a tribal gaming ordinance, such a requirement is implicit

in the statute, which applies only to gaming on Indian lands. This Court, however, "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Petitioner offers no persuasive reason to deviate from that rule in this case.

In any event, while it is true that IGRA applies only to gaming on Indian lands, it does not follow that IGRA forbids the NIGC from approving non-site-specific gaming ordinances like the Nooksack Tribe's. As the court of appeals noted (Pet. App. 21-22), IGRA provides for other means of enforcing the statute's Indian lands limitation once an ordinance has been approved. If a Tribe opens a gaming facility on a site that is ineligible for gaming under IGRA, then the statute authorizes the NIGC to take enforcement action, including ordering closure of the gaming facility. 25 U.S.C. 2713; see Pet. App. 21; see also *Amendments to Various National Indian Gaming Commission Regulations*, 74 Fed. Reg. 36,940 (2009) (to be codified at 25 C.F.R. 573.6(a)(13)) (providing that NIGC Chairman may issue order of temporary closure of a gaming facility on Indian lands not eligible for gaming under IGRA).

IGRA also directs the NIGC to report information indicating a violation of Federal, State, or Tribal law to the appropriate law enforcement officials. 25 U.S.C. 2716(b). If the NIGC determines that a gaming site does not qualify as Indian land under IGRA, then the NIGC may refer the matter to state officials or federal prosecutors. See Pet. App. 21-22; see also Gambling Devices Transportation Act, 15 U.S.C. 1171 *et seq.* (criminalizing some transportation and possession of gambling devices).

Petitioner contends (Pet. 17-18) that those enforcement mechanisms undermine the statutory goals of tribal economic development and self-sufficiency. But nothing in IGRA prevents Tribes from seeking site-specific approvals before commencing construction. And notably, the NIGC has recently promulgated regulations to facilitate review of Indian lands issues well before new facilities are opened. 73 Fed. Reg. at 6019; see Pet. App. 19-20. The new regulations authorize the Chairman to request documentation concerning the Indian lands information when the Tribe submits a proposed ordinance. 25 C.F.R. 522.2(i). The regulations also require a Tribe to notify the NIGC before opening a new gaming facility, 25 C.F.R. 559.1(a), and to provide site information necessary to determine whether the property is eligible for gaming under IGRA, 25 C.F.R. 559.2(a).

3. Petitioner errs in asserting (Pet. 11-13) that the court of appeals' decision conflicts with this Court's cases holding that an agency may not exceed the power conferred on it by Congress. See Pet. 11-12 (discussing *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), and *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). It is true that, under IGRA, the NIGC's authority is limited to the regulation of gaming on Indian lands. But when the NIGC approves a non-site-specific gaming ordinance, it does not thereby authorize gaming on non-Indian lands that are beyond its regulatory authority. Indeed, the ordinance the NIGC approved in this case expressly affirmed that each gaming facility opened under the ordinance would be located "on Indian lands." Pet. App. 4.

The question petitioner raises ultimately does not concern the scope of the NIGC's statutory power, but

the scope of its discretion to decide how to enforce IGRA's Indian lands limitation. As noted above, after an ordinance is approved, the NIGC retains enforcement authority to shut down gaming that occurs on Indian lands that are not eligible for gaming, and may refer gaming that occurs on non-Indian lands to the appropriate law enforcement officials. See p. 8, *supra*. In petitioner's view, however, the NIGC must enforce IGRA's Indian lands limitation in a different way—namely, by insisting that Tribes submit site-specific ordinances, and by making site-specific Indian lands determinations before approving the ordinances—even though, by its terms, IGRA imposes no such requirements. Nothing in the cases petitioner cites supports such a limitation on the NIGC's regulatory and enforcement discretion. Cf. *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) (noting that enforcement decisions are "generally committed to an agency's absolute discretion").[2]

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[2] Petitioner also contends (Pet. 18-21) that the court of appeals' decision conflicts with two district court decisions. Any such conflict would not merit this Court's review. See Sup. Ct. R. 10(a). In any event, both the gaming ordinance at issue in *Citizens Against Casino Gambling in Erie County* v. *Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (*Erie County*), amended on recons. on other grounds, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007), and the tribal-state compact at issue in *Apache Tribe* v. *United States*, No. 04-1184, 2007 WL 2071874 (W.D. Okla. July 18, 2007) (unpublished), concerned legal documents that were considerably more site-specific than the ordinance at issue in this case. See Pet. App. 14-16 (distinguishing *Erie County*); see also *Apache Tribe*, 2007 WL 2071874, at *1. The decision below, by contrast, held that the NIGC has no statutory duty to conduct an Indian lands determination before approving an ordinance in which "no potential gaming sites are identified, either specifically or generally." Pet. App. 15-16.

4. Finally, petitioner's challenge to the NIGC's approval of a non-site-specific ordinance raises questions of timeliness under the applicable six-year statute of limitations. See 28 U.S.C. 2401(a). Although the NIGC approved the Nooksack Tribe's ordinance in 1993, petitioners did not file suit until 2007. To address the question petitioner presents thus would require this Court to consider whether, as the district court held (Pet. App. 36-43), petitioner raised its challenge too late, or whether, as the court of appeals held, the limitations clock did not start to run until petitioner "took an interest" in the issue in 2006. See *id.* at. 6-10 (citing *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 715 (9th Cir. 1991)). For that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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